(4)

No. 90-549

In the Supreme Court of the United States

OCTOBER TERM 1990

CLIFTON R. WHARTON, JR., ETC., ET AL., PETITIONERS

v.

ERNEST F. DUBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JOHN G. ROBERTS, JR.
Acting Solicitor General
STUART M. GERSON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in this action under 42 U.S.C. 1983 based on state officials' alleged improper motivation in denying tenure to a university professor, plaintiff made a sufficient showing to defeat defendants' motion for summary judgment on the ground of qualified immunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statute, and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-549

CLIFTON R. WHARTON, JR., ETC., ET AL., PETITIONERS

v.

ERNEST F. DUBE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. In 1977, the State University of New York at Stony Brook (Stony Brook) hired respondent, Ernest F. Dube, as an assistant professor in its Africana Studies program. In the fall of 1981, Dube began teaching a course entitled "The Politics of Race." Pet. App. 6a-7a. As the court of appeals observed:

> A description of this course, apparently prepared by Dube for the summer term of 1983, made reference to "[t]he three forms of racism and how they manifested

> themselves: 1) Nazism in Germany [,] 2) Apartheid in South Africa[, and] 3) Zionism in Israel."

Id. at 7a. (brackets in original). The court further noted that

> [a] similar description for the fall, 1983 term stated: "We will . . . end up by discussing the three main forms of racism: overt racism, covert racism, and reactive racism. Examples of all three forms of racism will be discussed for comparative purpose[s]; *e.g.*, Nazism, apartheid, and Zionism."

Ibid. (brackets in original).

In the summer of 1983, Stony Brook received a complaint from a visiting professor that Dube was teaching students that "Zionism is as much racism as Nazism was racism." Pet. App. 7a.[1] Dube promptly informed Stony Brook officials that

> he had exposed his class to his own view that Zionism was not a monolithic ideology, but that among organizations and individuals identifying themselves as Zionists there were both groups with histories of espousing racist views and others who were not racist, and [he] had urged his students to avoid simplistic and stereotyped thinking.

Id. at 7a-8a. After an investigation by the Executive Committee of the Stony Brook Senate, the Committee determined that Dube's "teachings [were] within the bounds of academic freedom." *Id.* at 8a. Petitioner Marburger, Stony Brook's President, and petitioner Neal, Stony Brook's Provost, agreed with the Committee's assessment, as did the majority of the Stony Brook Senate in September 1983. *Ibid.*

Despite these formal actions, the Governor of New York, state legislators, Jewish community groups, and alumni

---

[1] The visiting professor also published his complaint to the news media. Pet. App. 7a.

allegedly pressured Stony Brook's administration to "repudiate [Dube] and to discontinue * * * teaching of [his course]." Pet. App. 8a. As a result, on October 19, 1983, petitioner Marburger issued a formal press release stating that

> [t]he Stony Brook administration, for which [he] speak[s] officially here, absolutely divorces itself from the views expressed in [Dube's] course, and from any view that links Zionism with racism or nazism. Furthermore, [he] personally find[s] such linkages morally abhorrent.

Id. at 9a, 84a. After this press release, Dube's course "was * * * removed from the course listings of the political science department." *Id.* at 9a.

2. Dube became eligible for tenure during the 1983-1984 academic year. Pet. App. 9a. Dube, however, in November 1983 requested "that his tenure review be postponed[,] citing as a reason that '[t]here has been so much noise about [his] course * * * that [he does] not think any objective evaluation is possible right now.'" *Id.* at 39a. Petitioner Marburger granted that request, postponing Dube's tenure review until the following academic year. *Id.* at 9a.[2]

At that time, petitioner Neville, Stony Brook's Dean of Humanities and Fine Arts, appointed seven faculty members

---

[2] In the interim, petitioner Marburger appointed Dube as a lecturer for the 1984-1985 academic year, and as an assistant professor for the 1985-1986 academic year. Pet. App. 39a. As the district court pointed out, Dube

> was [also] advised that pursuant to the labor agreement between [Stony Brook] and the United University Professors, Inc. and the policies of the Board of Trustees that in the event that tenure was not granted his employment at Stony Brook would terminate on August 31, 1986.

Ibid.

to an ad hoc committee to review Dube's file and recommend whether he should be tenured and promoted. In the spring of 1985, that committee voted 6-1 in favor of tenuring Dube and 4-3 in favor of promoting him. Pet. App. 10a, 39a.[3] Following established procedures, the committee forwarded its recommendations to the "Personnel Policy Committee"—a standing committee elected by the Stony Brook faculty. That committee in early May "voted 4-3 in favor of granting tenure to Dr. Dube and unanimously against promotion." *Id.* at 39a. As the chairman of the committee reported to petitioner Neville:

> Professor Dube's understanding of racism, gained primarily through experience, but to some extent through research, is unique at Stony Brook. As a serious and thought-provoking teacher, Dube helps students develop perspectives of this pervasive form of prejudice. There was general agreement that both the quantity and quality of [Dube's] written scholarship was short of the usual standards. Accordingly, there was in our discussion very little support for promotion. Fairness both to other candidates and to the scholarly goals of the University require that we recommend against promotion for the level of scholarly activity reflected by this record.

Id. at 52a.

In late May, Dean Neville, after reviewing the Personnel Policy Committee's recommendations, formally recommended to Provost Neal that Dube be denied tenure and promotion. Pet. App. 11a, 40a; see *id.* at 54a-60a. Neville

---

[3] In a statement issued by the review committee's chairman, the committee stated that "[t]here is no question that Professor Dube's expertise and activities make him an exciting, valuable and not replaceable resource to Africana Studies, students, and the university community." Pet. App. 51a.

noted that "[t]he chief sticking point in Professor Dube's case is his publications which consist of three items." *Id.* at 55a. After briefly reviewing and summarizing those publications, Neville stated that, "concerning publication, Professor Dube's list is not only far shorter than is usually required for tenure, but also does not contain the mature development of an intellectual project we look for in granting faculty tenure." *Id.* at 56a. On the other hand, Neville observed that "[w]hat is special about Professor Dube * * * is not his service and teaching per se but the experience he brings to it. He is a cultural resource, as it were, a walking library and video collection." *Id.* at 57a.[4] In explaining his ultimate recommendation, Neville stated:

> Because the virtue of Professor Dube's historically important experience does not in fact contribute to what is important for tenure, I believe this case in the end turns out to be comparable with other good teacher-citizens whom we turn down because of a poor publication record. Regarding publications alone—and the teaching and service records are quite comparable—Professor Dube has less work in quantity, and of lesser academic maturity, than the other two in the Division against whom I recommended this year. And so I must recommend against Professor Dube.

Id. at 59a.

In July 1985, Provost Neal agreed with Dean Neville's recommendation, and thus recommended to President

---

[4] Dean Neville remarked that "nothing in the file whatsoever supports the kind of criticism raised against Professor Dube last year to the effect that he is a racist, an anti-Zionist, or an anti-Semite." Pet. App. 54a. He acknowledged that "some elements of the external Jewish community might want to see [Dube] dismissed." *Id.* at 55a. He concluded, however, that "that desire cannot arise from a thorough reading of [Dube's] teaching contributions." *Ibid.*

Marburger that Dube "not be promoted nor granted continuing appointment." Pet. App. 62a. Neal first observed that the Personnel Policy Committee's split recommendation was an "exception to standard practice." *Id.* at 61a. He then stated:

> Continuing appointment at a major research university is warranted only when an individual has taken his or her unique experiences, training, background and insights and prodigiously translated them into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come.

Ibid. Dube failed to meet that standard, according to Neal, since his "publication record is extremely limited" and "he has not produced the kind of scholarship we require of others whom we award continuing appointment or promote." *Id.* at 62a.

In August 1985, President Marburger, agreeing with the recommendations of Dean Neville and Provost Neal, recommended denial of tenure and promotion. Pet. App. 12a, 40a; see *id.* at 63a-65a. Marburger explained that his

> decision was based on findings by faculty evaluation committees that indicate shortcomings in the area of scholarship. The shortcomings do not have to do with lack of expertise, but rather with evidence that in the words of Provost Neal, your unique experiences, training, background and insights have not been translated into a form, based on the rigors of scholarly traditions, that can be read and shared by scholars for generations to come.

Id. at 65a.[5]

---

[5] Marburger also told Dube that "the reasons for non-renewal of [your] contract are not related to the incidents [that prompted Dube's delaying his tenure review]." Pet. App. 65a.

3. Dube appealed Marburger's decision to petitioner Wharton, Chancellor of the State University of New York.[6] Under the terms of the collective bargaining agreement between Dube's union and the State of New York (see note 2, *supra*), a three-member advisory committee was convened to review the tenure decision.[7] That committee unanimously recommended to Chancellor Wharton that Dube be granted tenure without promotion. Before Wharton had reached his decision, however, "the advisory committee's report was disclosed to the press and to * * * a labor organization in competition with [Dube's union], who urged that Dube be tenured." Pet. App. 12a. In view of what Wharton considered a "breach of . . . the basic principles of confidentiality inherent in the tenure review process," *id.* at 13a, he decided to convene a second advisory committee before rendering his decision. Wharton also extended Dube's appointment through February 28, 1987. *Ibid.*

In November 1986, the second advisory committee recommended to Chancellor Wharton that Dube either "receive tenure as an Assistant Professor, or * * * [have his] contract * * * extended for an additional three years (1987-1990)." Pet. App. 70a. In the committee's judgment, Dube "is greatly needed by the Africana Studies Program and is a valuable resource of [the] University." *Ibid.* The committee noted that Dube's "publication record has been below the levels normally considered adequate for promotion and tenure at SUNY/Stony Brook," *id.* at 67a-68a, but also observed that "[f]rom 1983-1986, the problems that

---

[6] Wharton stepped down as Chancellor effective February 1, 1987. At that time, Jerome Komisar assumed the office as Acting Chancellor. Pet. App. 14a.

[7] As the court of appeals explained, "Dube and Marburger each selected one committee member, and those members then selected a third individual to serve as the committee's chair." Pet. App. 12a.

relate to [Dube's] teaching about racism certainly interfered with his research and writing activities," *id.* at 69a.

In January 1987, Chancellor Wharton notified Dube of his final decision denying tenure and promotion. Pet. App. 13a-14a; see *id.* at 71a-73a. In his letter to Dube, Wharton explained that

> it is quite clear that research receives a much larger weight [in a tenure decision] on a graduate/research comprehensive university campus [such as Stony Brook] than on a four-year arts and science campus * * *. Your strong record in teaching and in public/community service was not sufficient to offset the deficiency in scholarly publication. This is a conclusion which was made by all parties in the process, including the most recent Chancellor's Advisory Committee.

Id. at 71a. Wharton also acknowledged the controversy surrounding Dube's teaching, and observed that "these extraneous issues—irrelevant to the tenure decision *per se*—will be used both by [your] critics and defenders to interpret whatever decision is made." *Id.* at 72a. He stated that "Stony Brook should be allowed to exercise its judgment that research be given proper weight," but that "you * * * should not be penalized professionally for inaccurate perception of * * * an adverse [tenure] decision." *Ibid.* Accordingly, Wharton offered Dube "an opportunity for a continuing appointment at another campus with the [State University of New York] system providing that such a campus is willing to do so." *Ibid.*[8]

---

[8] Wharton extended Dube's appointment through August 1987, in order to help him "pursue the possibility of appointment at one of SUNY's other campuses." Pet. App. 73a. Dube apparently did not pursue that offer. See Pet. 11.

4. In May 1987, Dube filed this federal court action under 42 U.S.C. 1983 against petitioners Wharton, Marburger, Neal, and Neville, and the State University of New York and Acting Chancellor Komisar.[9] With respect to petitioners, Dube claimed that their adverse tenure decision amounted to a violation of his rights under the First Amendment. Compl. ¶¶ 91-94. Dube sought compensatory and punitive damages and a permanent injunction requiring his appointment to a tenured position at Stony Brook. Pet. App. 14a-15a, 36a-37a.[10]

[9] Several student organizations and Stony Brook professors joined Dube as plaintiffs. The district court dismissed these plaintiffs' claims with prejudice, and plaintiffs sought no further review from that ruling. Pet. App. 5a n.1

With respect to Dube's claims against the State University, the district court held that the Eleventh Amendment barred his claim for damages, but did not bar the claim for injunctive relief. Pet. App. 47a. The court of appeals reversed, holding that the Eleventh Amendment barred each of Dube's claims against the State University. *Id.* at 19a-20a. Dube has sought no further review of that aspect of the court of appeals' judgment. With respect to Dube's claims against Acting Chancellor Komisar, the district court permitted those claims to proceed to trial, but the court of appeals reversed, "find[ing] no support for *any* claim against Komisar." *Id.* at 31a. Dube has not challenged that ruling.

[10] Dube also claimed that petitioners' adverse tenure decision deprived him of property without due process of law, in violation of the Fourteenth Amendment, and that their decision violated state law. Pet. App. 15a. The district court denied petitioners' motion for summary judgment on those separate claims. *Id.* at 44a-47a. The court of appeals dismissed Dube's claim under the Fourteenth Amendment, concluding that Dube "has failed to meet the threshold requirement of establishing a protectable 'liberty' or 'property' interest." *Id.* at 29a-30a. The court of appeals also affirmed the district court's order allowing Dube's pendent state law claims to proceed to trial. *Id.* at 31a. Neither Dube nor petitioners have sought further review of these rulings.

Dube also sought a preliminary injunction requiring petitioners to extend his appointment pending the disposition of the lawsuit. The district court denied relief, and Dube did not appeal that ruling. Pet. App. 14a n.3.

After discovery, petitioners in October 1987 filed a motion for judgment on the pleadings or in the alternative for summary judgment. Petitioners asserted, among other grounds, the defense of qualified immunity. Each petitioner also submitted an affidavit, stating that "his recommendation concerning [Dube's] tenure and promotion was based solely on the academic merits, and that the controversy concerning [Dube's course] was not a factor in the decision." Pet. App. 15a; see C.A. App. 213-587. As the court of appeals summarized, "[e]ach affidavit also noted the specific academic considerations taken into account in arriving at the recommendation in question." *Ibid.* In opposition to petitioners' motion, Dube submitted a statement of material facts in issue, under S.D. N.Y. Civ. R. 3(g), based on documents and deposition testimony produced during discovery. See C.A. App. 609-784; Resp. Br. in Opp. 16-45.

5. In October 1988, the district court denied petitioners' motion for summary judgment on Dube's First Amendment claim. Pet. App. 35a-47a. The court first concluded that, given Dube's evidentiary submission, "[t]he trier of facts may reasonably infer that 'but for' the exercise of his First Amendment right of free speech [Dube] would have been granted tenure." *Id.* at 44a. Turning to petitioners' defense of qualified immunity, the court stated that it "understand[s] [Dube's] theory of liability to rest on a claim that the university, through its President and Chancellor, failed to exercise the authority with which it was vested and permitted community outrage over the exercise of his First Amendment rights to deny him tenure." *Id.* at 45a. In these circumstances, the court held,

> [t]he defense that [petitioners] had a good faith belief of reasonable university officials that the denial of tenure was "based on [Dube's] file and the standards

> applicable at Stony Brook and in light of clearly established law" * * * is not an answer to [Dube's] claim.

Ibid. (citation omitted). Accordingly, the court denied petitioners' motion based on qualified immunity, noting that the "relationship between the exercise of [Dube's] First Amendment rights and the denial of tenure appear to be distant both in time and subject matter." *Id.* at 46a.

6. The court of appeals affirmed. Pet. App. 2a-34a.[11] The court of appeals first found that Dube "has proffered evidence from which a jury could find that [petitioners] denied tenure and promotion to him in response to pressure exerted by government officials and community activists outraged by his teaching." *Id.* at 25a.[12] Having "take[n] Dube's assertion of retaliatory motive as true," *id.* at 26a, the court framed the relevant inquiry as follows, namely, "whether, in light of clearly established law, it was objectively reasonable for [petitioners] to believe that denying tenure to Dube in retaliation for the exercise of his First Amendment rights was lawful," *ibid.* The court concluded that "[t]his purely legal question * * * must be answered in the negative, as the facts alleged by Dube unequivocally support his claim of violation of long-standing and clearly established First Amendment law." *Ibid.* The court therefore held that petitioners "are *not* qualifiedly immune from section 1983 liability on Dube's First Amendment claim." *Id.* at 27a.

---

[11] As a threshold matter, the court concluded that it had jurisdiction over petitioners' interlocutory appeal. Pet. App. 21a-23a. In separate concurring opinions, Judges Miner and Mahoney explained their reasons for joining this holding. See *id.* at 32a-34a.

[12] The court cited, "by way of example," President Marburger's statement in October 1983 and Chancellor Wharton's letter to Dube in January 1987. *Id.* at 25a; see p. 3, 8, *supra*.

DISCUSSION

In *Siegert* v. *Gilley*, 111 S. Ct. 292 (1990), this Court has granted certiorari to resolve a question closely related to the question presented here. In that case—a *Bivens* action based on a federal official's alleged malice[13]—the question presented is whether, once the defense of qualified immunity is raised, the plaintiff must support his claim with more than conclusory allegations in order to proceed with the litigation. We contend, on behalf of the federal official, that the court of appeals in *Siegert* was correct in imposing such a requirement and in insisting on greater specificity than is required in other contexts in which the defendant's state of mind is an element of the claimed wrong. We further contend that this requirement is essential if the defense of qualified immunity is to have the substantive scope and effect mandated by this Court's decisions in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), and related cases.[14]

The present case, like *Siegert*, is one in which a critical element of the claimed constitutional violation is the state of mind of the government officials who are defendants in the action. (While this action, unlike *Siegert*, arises under 42 U.S.C. 1983, the Court has made plain that the scope of qualified immunity in the *Bivens* context and in an action under Section 1983 is generally the same. See *Harlow* v. *Fitzgerald*, 457 U.S. at 818 n. 30; *Butz* v. *Economou*, 438 U.S. 478, 504 (1978).) But unlike the court of appeals' decision in *Siegert*, and the decisions of other courts of

[13] *Bivens* v. *Six Unknown Named Narcotics Agents*, 403 U.S. 388 (1971). In *Siegert*, petitioner alleged, among other claims, that respondent, an official at the government facility where petitioner had been employed, violated petitioner's constitutional rights by maliciously and in bad faith giving an unfavorable reference to petitioner's prospective employer.

[14] We have provided copies of our brief in *Siegert* to the parties in this case.

appeals that have adopted a similar approach, it is not clear whether the court below applied the rigorous standard that we believe the qualified immunity defense requires in determining whether a case should be allowed to proceed.[15] Indeed, the court of appeals in this case appears to have allowed the plaintiff to continue the litigation on the basis of the sort of conclusory allegations that the *Siegert* court refused to countenance. This is of especial concern in a case, such as this, in which the defendants' state of mind is central to the plaintiff's cause of action.

Under these circumstances, we believe that reconsideration by the court below may be warranted on the basis of this Court's decision in *Siegert*. We therefore recommend that the petition be held for disposition in light of the Court's decision in that case.

---

[15] Cf. *Contemporary Mission, Inc.* v. *United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981) ("Something more than a fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact.").

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Siegert* v. *Gilley*, cert. granted, 111 S. Ct. 292 (1990).

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
STUART M. GERSON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys

FEBRUARY 1991

---

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282 061/20340